United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

MEMORANDUM (MEMO)

To: Wiley (Pete) Horsley, Della (Dee) Emmerich

From: James (Jim) Weiner

Date: July 25, 2002

Re: Department of the Interior (DOI) Acquisition Release 2002-2

You have asked that our office weigh in on whether certain language in the Department of the Interior and Related Agencies Appropriations Acts for 2001 and 2002 permits the Department to solicit and award contracts for hazardous fuels reduction, and related monitoring activities, on a less than fully competitive basis. Based upon a plain reading of the legislation, basic tenets of statutory construction, and recent General Accounting Office (GAO) precedent, I believe we can fairly read the legislation to authorize less than full-and-open competition with respect to those activities.

The appropriations language in question is, in material part, as follows:

> (1) * * * Notwithstanding Federal government procurement and contracting laws, the Secretaries [of Agriculture and Interior] may conduct fuel reduction treatments on Federal lands using grants and cooperative agreements. Notwithstanding Federal government procurement and contracting laws, in order to provide employment and training opportunities to people in rural communities, the Secretaries may award contracts, including contracts for monitoring activities, to—
>
> > (A) local private, nonprofit, or cooperative entities;
> > (B) Youth Conservation Corps crews or related partnerships, with State, local and non-profit youth groups;
> > (C) small or micro-businesses; or
> > (D) other entities that will hire or train a significant percentage of local people to complete such contracts.

Twice in this language, the phrase "Notwithstanding Federal government procurement and contracting laws . . ." appears. It prefaces the sentence about using grants and cooperative agreements and, immediately following, prefaces a more detailed statement about contracting. In the latter statement, the stated goal is "to provide employment and training opportunities to people in rural communities." After that, there is a disjunctive ("or") listing of the kinds of entities to whom the Secretary may award these contracts in furtherance of this goal.

I believe that the "Notwithstanding" language was intended to *mean* something. To assume that it has no real meaning–thus, reducing it to "mere surplusage"–is contrary to established principles of statutory construction. *State of California v. Dept. of Justice*, 114 F.3d 1222, 1225-1226 (D.C. Cir. 1997), citing *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995). One principle is that "[w]hen construing an act of Congress, and especially when determining the essential characteristic of a particular statute, we must observe and understand the statute as whole." *Yankee Atomic Electric Company v. United States*, 112 F.3d 1569, 1576 (Fed. Cir. 1997). "In determining the meaning of the statute, we look . . . to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

If the "Notwithstanding" language means something–as it must–then what does it mean? "Notwithstanding" is a distinct term with a recognized meaning. It is a term of choice by drafters to concisely communicate the following: "Here, you may disregard other laws that you'd usually not be able to disregard when you do the thing that we're authorizing (or requiring) you to do." Sometimes the agency is authorized to do things. Other times, mandated. *See e.g. Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374, 1378-79 (Fed. Cir. 1999) ("Notwithstanding any other provision of this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations"); *State of California v. Dept. of Justice*, *supra*. But the meaning is the same in either case. In the Interior appropriation language, Congress specifically stated that the kinds of laws the Secretary is free to disregard, if the Secretary elects to do so to achieve the statutory goal, are "government procurement and contracting laws." It is difficult to imagine how this could be more clearly stated. We must assume that Congress "says in a statute what it means and means in a statute what it says." *Babbitt v. Oglala Sioux*, *supra*, 194 F.3d at 1378, citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

In *HAP Construction, Inc.*, B-280044.2, Sept. 21, 1998, 98-2 CPD ¶ 76, the GAO discussed the following language in the Robert T. Stafford Disaster Relief and Emergency Assistance Act:

> In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract . . . preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.

42 U.S.C. § 5150.

The GAO affirmed that this language falls within FAR § 6.302-5, which provides that "Full and open competition need not be provided for when . . . a statute expressly *authorizes or requires* that the acquisition be made . . . from a specified source . . ." § 6.302-5(a)(2)(emphasis added). Indeed, the FAR lists the above section of the Stafford Act as an example of such authority ("This authority may be used when statutes, *such as the following*, expressly *authorize or require* . . ."). § 6.302-5(b)(5)(emphasis added).

The Stafford Act language calls for a preference. The Interior appropriations language calls for a preference. The Stafford Act mandates the preference ("shall"), but then qualifies this with what is "feasible and practical." The Interior language is somewhat more permissive. The Stafford Act language expresses a preference for local or regional concerns. The Interior language expresses a preference for local, rural labor. But the Interior language has the added force of the "Notwithstanding" language to make its intent even clearer.

Thus, I believe an unstrained and straightforward reading of the Interior language gives the agency the discretion to restrict competition in furtherance of the stated goal. This can include restricting competition to (a) only a certain locality or region and/or (b) only particular kinds of entities, or (c) defining requirements or setting evaluation criteria in a manner that favors local or regional firms or particular kinds of entities to the point of, for all practical purposes, excluding others.[1/] The GAO will not question an agency's implementation of "statutory procurement requirements" unless the record shows that the implementation was unreasonable or inconsistent with congressional intent. *HAP Construction*, *supra*, at 4. So, there is wide leeway to accomplish the goals of the Interior language.

Please call me, at (202) 208-6984, if you wish to discuss this further. I will be happy to review the draft DOI Acquisition Release.

1/ I do not believe that the fact that some non-local and/or large firm somewhere *could* conceivably promise to hire a share of local workers–category "(D)"–means that potential category "(D)" offerors *must* be included in every procurement. Category "(A)," alone, may best meet the goal in a particular instance. Category "(B)" in another. It would, of course, be best if there were a record (market research, etc.) supporting a particular approach prior to initiating a procurement.